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IN THE

Supreme Court of the United States

October Term, 1966

No. 825

WILLIAM SPROWAL,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee respectfully moves to dismiss the appeal in the above-entitled action on the ground that it does not present a substantial federal question, or to affirm.

Opinion Below

The opinion of the Appellate Term of the Supreme Court, First Department (Appendix to Appellant's Jurisdictional Statement) is reported at 49 Misc. 2d 806 (1966). There is no opinion in the Court of Appeals.

The Statute Involved

Section 722-b of the New York Penal Law provides:

"Loitering in school buildings.

"Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Statement

Ignoring repeated police requests to distribute his leaflets away from the main entrance area of Charles Evans Hughes High School, the defendant Sprowal defiantly remained there, dispensing to several hundred students milling around him. Finally, after scorning the officer's reasonable request for a period of one-half hour, Sprowal, together with four others who were also distributing leaflets, was arrested for "loitering * * * about a school building" in violation of Section 722-b of the Penal Law. At trial Sprowal and one of his confederates, Steven Gordon, were convicted of this offense, and their three co-defendants acquitted (LEVY, J.).

The Appellate Term, First Department, affirmed Sprowal's conviction, and as to Gordon, reversed the judgment and ordered a new trial. Sprowal and Gordon then jointly applied for leave to appeal to the New York Court of Appeals, and their application was granted by order dated

February 9, 1966 (FULD, J.). Subsequently, Gordon applied to the court to withdraw his appeal; the application was granted by order dated April 20, 1966; the People then moved in Criminal Court to dismiss the complaint pending against Gordon and the motion was granted (April 22, 1966). On June 9, 1966, the Court of Appeals affirmed Sprowal's judgment of conviction, two judges dissenting.

The defendant seeks to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Section 722-b as applied is void for vagueness; that the statute as applied infringes his rights under the First and Fourteenth Amendments; that the statute imposes an unconstitutional prior restraint on speech.

THE EVIDENCE

The People's Case

Patrolman **Raymond Gruntz** testified that on the afternoon of May 29, 1964, he was on duty at the Charles Evans Hughes High School, located on West 18th Street between Eighth and Ninth Avenues (9).* The school building was directly adjacent to the sidewalk and was not bordered by a fence or yard. Above the main entrance was posted a sign stating that loitering in front of the building was prohibited (29).

At about 1:10 p.m., as school was recessing for the day, a group including the defendant Sprowal and his four

* References, unless otherwise indicated, are to the typewritten minutes of the trial.

codefendants at trial—none of whom were students or parents of students in the school (29, 30)—walked toward the main entrance of the building (10, 17). Approaching the group, Patrolman Gruntz asked the defendant Sprowal what their purpose was and he replied that they intended to distribute literature to students in front of the school (10). The officer told them that such act would be loitering in violation of Section 722-b of the Penal Law; that they could distribute their literature at the corner of another block, but not in front of the school (10-12).

While the officer addressed them, the group began distributing leaflets* to more than one hundred students who had gathered around them (12, 17). Replying to the officer, Sprowal said, "I refuse to move out of this block" (13). Again, Patrolman Gruntz directed the group to move away from the school, but they remained there, distributing leaflets (13). At this point the officer entered the school to telephone for assistance (13). Returning to the street a few minutes later, he saw the defendant Sprowal and the four codefendants standing in a circle on the sidewalk about five feet from the main entrance to the school and distributing leaflets to about two hundred students "milling around" them (18, 23-4).

Sprowal and his four codefendants remained in approximately the same position, surrounded by students, for the next twenty-five minutes at which time Gruntz received assistance (13, 25). He then placed Sprowal under arrest and again told the rest of the group to leave the block (14).

* The leaflets being distributed requested students to work with and join CORE and also requested support for a bill to establish an independent civilian board to review charges of improper police activities.

Upon the refusal of codefendants Abel, Siderellis, and Lanier to do so, Gruntz arrested them (14-15).

Meanwhile, after Sprowal's arrest, codefendant Gordon had walked to a point approximately fifty to two hundred feet east of the school building where he continued distributing leaflets (15, 25-6). Gruntz dispatched one of the assisting officers to bring back Gordon (15). When Gordon returned with the officer, Gruntz told him to leave the block (16). Gordon refused, stating he was going to stay with Sprowal, whereupon Gruntz placed him under arrest (16).

The Defense

The defendant, **William Sprowal**, a CORE worker, testified that on the afternoon in question as he and seven others, including the four codefendants, approached the Charles Evans Hughes High School, they were met by Patrolman Gruntz (32-3). Questioned by the officer as to their purpose, Sprowal replied that it was to distribute leaflets (34). After examining some of the leaflets that the group carried, Gruntz told them, "You can't distribute leaflets here" (34). Sprowal then told the others that if anyone were to be arrested, it would be him, and that they should move across the street from the school (34).

Lanier, Siderellis and Abel did as Sprowal directed while Sprowal remained at the entrance to the school and Gordon moved down the street away from the entrance (34). At these positions they began distributing leaflets to students coming out of school (36-8).

About ten minutes later Gruntz approached codefendants Abel and Siderellis and told them that they were

under arrest (35, 88). Walking over to the officer, Sprowal asked him the reason for the arrests (35). Replying that the arrests were for distributing leaflets, Gruntz told Sprowal that he would be arrested if he did not move (35). Sprowal refused and he also was placed under arrest (35). Gruntz then dispatched another officer who had arrived on the scene to summon Gordon from his position down the street; Gordon was brought to him and placed under arrest (35-6).

Codefendants **Steven Gordon, James Lanier, Mary Ann Siderellis** and **Kathryn Abel** testified that on the afternoon in question only the defendant Sprowal distributed leaflets to students near the main entrance of the Charles Evans Hughes High School (52, 76, 90); that Gordon distributed leaflets at a corner on the same side of the street as the school, a great distance from the building (52, 76-7); that Lanier, Siderellis and Abel distributed leaflets across the street from the school building (50, 83, 88).

ARGUMENT

No Substantial Federal Questions are Presented.

On a May afternoon, as Charles Evans Hughes High School recessed for the day, the defendant Sprowal, neither a parent nor a guardian of any student in the school, positioned himself on the sidewalk about five feet from the main entrance of the building and began distributing leaflets to students emerging from the school. For the next half-hour, the defendant—ignoring both a sign posted over the main entrance prohibiting loitering in front of the

building and repeated requests by a police officer to move—persisted there, distributing the leaflets to several hundred students who gathered around him.

Defendant's conduct unquestionably constituted "loitering * * * in or about any school building" within the meaning of Section 722-b of the Penal Law as construed by New York's highest court in *People* v. *Johnson,* 6 N. Y. 2d 549 (1959). There, the defendant, neither a parent nor guardian of a student in the school, and having no written permission from the principal to be in the school, waited fifteen minutes outside a classroom for a friend who was inside, finishing his last class of the day. Sustaining Johnson's Section 722-b conviction on these facts, the Court of Appeals held that defendant's failure to "come within the statutory exceptions"—parentship or guardianship of a student—and his lack of "permission to enter the school premises and this in face of a prior warning to keep out" rendered his presence in the building "loitering" in violation of the statute [*id.* at 553]. Similarly, the statutory exceptions are inapplicable here and the requirements of proof under Section 722-b, as construed in *Johnson,* were amply satisfied. And, it was further held in *Johnson*: "[r]ead in the light of the nature of a school building, the statute is sufficiently clear and unambiguous to inform the public of the proscribed act" [*id.* at 552].

That defendant's conduct falls within the statute's purpose is persuasively demonstrated in the opinion of the Appellate Term.* The primary concern of the legislature in passing Section 722-b, as the Appellate Term opinion

* That opinion is set out in the Appendix to Appellant's Jurisdictional Statement, pages 8a-21a.

correctly noted, was the frequent presence in the school area of dope peddlers, sex offenders, vandals, and persons "making nuisances of themselves" [Appellant's Appendix, p. 11a]. Discussing the remedy chosen by the legislature, the Appellate Term opinion properly concluded that Section 722-b was "designed to insulate students from the dangers and evils" by "a blanket prohibition against the presence of all unauthorized persons from the vicinity of the school grounds" [*id.* at pp. 11a, 14a].

Plainly, defendant's prolonged presence several feet from the main entrance to the school was "unauthorized," thus within the purposes of the statutory proscription. Emblazoned over the entrance in clear view of the defendant was a "no loitering" sign. A police officer, ascertaining that Sprowal intended to stand at the school entrance and distribute leaflets, informed the defendant at the outset that his presence there was unlawful, and repeated this admonition continuously for the next half-hour. Dispelling any question that Sprowal's presence was "unauthorized," thus in violation of the statute, was his own testimony that he attempted to have his confederates comply with the law by directing them to quit his side at the school entrance. To exclude Sprowal's "unauthorized" presence from the legislature's "blanket prohibition" of such persons from the school area would, as the Appellate Term justly pointed out, impair the legislative purpose by forcing the authorities:

> "to scrutinize every person near a school with leaflets in order to distinguish between those with leaflets only, and others who may have obscene matter and narcotics in addition to leaflets" [*id.* at p. 4].

Unfounded is defendant's contention that if his conduct does fall within the legislative purpose, then the statute as applied infringes his constitutional right to disseminate information. To begin with, and most obvious, as noted by the Appellate Term, the statute has no concern with prohibiting First Amendment activity [*id.* at p. 6]. Absent here is the odious and oft-condemned ordinance banning all leaflet distribution in public streets [see *e.g. Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939)]. Rather, the statute here is a narrowly drawn proscription as to an insignificant portion of the public way, only incidentally affecting freedom of speech [see *Cox* v. *Louisiana,* 379 U. S. 550 (1965)]. This minor restriction left the defendant free, as the police officer suggested, to distribute his leaflets any place on the school block outside of the immediate vicinity of the school building, thus fully enabling him to reach his intended audience. Significantly, the codefendants who distributed leaflets directly across the street from the school were acquitted. Their acquittal graphically reveals the insignificant effect of the statute's restriction of leaflet distributors.

This Court has consistently held that narrowly drawn regulations affecting the time, place or manner of disseminating information in public places are valid exercises of the police power so long as substantial reason exists for the regulation [*Schneider* v. *State,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941); *Kovacs* v. *Cooper,* 336 U. S. 77 (1948); *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953); *Cox* v. *Louisiana,* 379 U. S. 562 (1965)].

The criterion of substantiality of purpose may best be illuminated by contrasting legislative objectives that have been held substantial enough to justify regulation of constitutionally protected activity, with purposes deemed insufficient to support such regulation. In the former category are: protecting the "tranquility of residential areas" [*Kovacs* v. *Cooper,* 336 U. S. 77 (1948)]; protecting the health of the community [*Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905)]; maintaining highway safety [*Cox* v. *New Hampshire,* 312 U. S. 569 (1941)]; preventing traffic disruption on business streets [*Kovacs* v. *Cooper, supra*]; avoiding strife between industrial disputants [*Gibboney* v. *Empire Ice and Storage Co.,* 336 U. S. 490 (1949); see *Thornhill* v. *Alabama,* 310 U. S. 88 (1940)]; maintaining efficiency of public employees [*United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947)]; satisfying the "aesthetic" needs of the community [*People* v. *Stover,* 12 N. Y. 2d 462 (1963), cert. den. 375 U. S. 42 (1963)]. On the other hand, legislative objectives lacking the requisite substantiality include: keeping the streets litter-free [*Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147, *supra*]; protecting home dwellers against disturbance by itinerant preachers [*Martin* v. *City of Struthers,* 319 U. S. 141 (1943)]; protecting home-dwellers against fraudulent appeals in the name of charity and religion [*Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); see *Schneider* v. *State, supra*].

When, as in *American Association* v. *Douds,* 339 U. S. 382, 401 (1950), the statute in question "is compared with ordinances and regulations dealing with littering of the streets or disturbance of householders by itinerant

preachers, the relative significance and complexity of the problem'' focused on by the legislature ''becomes at once apparent.'' The indisputable purpose of Section 722-b, as stated by New York in *People* v. *Johnson,* 6 N. Y. 2d 549, 552 (1959), was guarding the ''moral and physical safety and well-being'' of ''immature school children'' [*People* v. *Johnson, supra* at 552]. Comparison of this vital purpose with the above legislative objectives pales not only those deemed insubstantial, but also many whose substantiality was sanctioned. For example, tranquility of residential neighborhoods, orderly traffic on business streets, community beauty, efficiency of public servants—objectives all passing constitutional scrutiny, all unquestionably desirable—are hardly as central to the public weal as is the protection of tender-aged youth from those who would prey on them.

Indeed, exercise of the state's police power specifically for the well-being of children is accorded wider scope than that allowed for general police power enactment [*Prince* v. *Massachusetts,* 321 U. S. 158 (1943); see *Butler* v. *Michigan,* 352 U. S. 380 (1957); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964); *People* v. *Bookcase, Inc.,* 14 N. Y. 2d 409 (1964); *People* v. *Kahan,* 15 N. Y. 2d 311 (1965); *People* v. *Tannenbaum,* 18 N. Y. 2d 268 (1966)]. This priority of legislation designed for the safety and welfare of children was well-expressed by this Court in *Prince* v. *Massachusetts, supra* at 168-9:

> ''A democratic society rests for its continuance, upon the healthy, well-rounded growth of youg people into full maturity as citizens, with all that implies. It may secure that against impeding restraints and

> dangers within a broad range of selection. Among evils most appropriate for such action are * * * the possible harms arising from activities subject to all the diverse influence of the street."

Equally unfounded is defendant's contention that since Section 722-b authorizes the presence in the school area of a person having a "written permission" from the school authorities, then the statute imposes an unconstitutional "prior restraint" on speech (brief, pp. 12-13).

The simple and complete answer to this assertion, as the Appellate Term opinion discerned, is that the statute imposes no prior restraint on speech. Prior restraint hinges the exercise of a First Amendment right upon an advance governmental approval [see *e.g., Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *CIO,* 307 U. S. 496 (1939]. Its evil is that of government censorship of expression [*Near* v. *Minnesota,* 283 U. S. 697 (1931); *Saia* v. *New York,* 334 U. S. 558 (1948)]. The legislature, as the Appellate Term properly noted, did not contemplate leaflet distributors within the category of persons to whom "written permission" could be extended. Such persons were left free to carry out their purpose any place on the school block outside the immediate school area.

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented; or, in the alternative, the judgment below should be affirmed as eminently sound and fully consistent with pertinent constitutional principles.

Respectfully submitted,

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